FILED
AUG 10 1955
HAROLD B. WILLEY, Clerk

No. 307

IN THE

Supreme Court of the United States

OCTOBER TERM, 1954

PURITAN CHURCH—THE CHURCH OF AMERICA
PURITAN CHURCH BUILDING FUND, *Petitioners*

v.

COMMISSIONER OF INTERNAL REVENUE, *Respondent*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

PURITAN CHURCH—THE CHURCH OF AMERICA
PURITAN CHURCH BUILDING FUND

By: EDITH S. PARKER

REV. HARRISON PARKER
Trustees acting under the designation of the above entitled cause.
820 Connecticut Avenue, N. W.
Washington, D. C.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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PETITION FOR WRIT OF CERTIORARI

ORDER BELOW

The final Order of the United States Court of Appeals for the District of Columbia Circuit in this litigation is found on page 51 of the court record and in the appendix hereof.

GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED

This court is vested with jurisdiction to review the orders of the U. S. Court of Appeals for the District of Columbia Circuit by writ of certiorari, under the provisions of Title 28 Part IV, Sec. 1254 (1), United States Code, as amended. Petition for a rehearing was denied by the United States Court of Appeals on March 22, 1955. (R. 68). Time for filing of this petition was enlarged by Chief Justice Warren, to August 15, 1955.

QUESTIONS PRESENTED

In the view of the petitioners, the issues are as follows:

Major Issue

(a) Refusal by the United States Court of Appeals for the District of Columbia Circuit, to accord to the Puritan Church Building Fund the protection of the law established by this Court, in the *Hazel-Atlas Co.* v. *Hartford Co.*, 322 U.S. 238, is a dangerous error under a form of government such as ours. That error is sullying the honor of the entire judicial system of the Government of the United States, including its legal profession. That error might be the cause of the ultimate downfall of the Republic unless it shall be rectified, in this proceeding, by a mandate from the Supreme Court of the United States, to the Tax Court, to restore to that Trust Fund the $50,529.90 cash that was mulct from it by the decision of the Tax Court, dated September 28th, 1951, signed Luther A. Johnson, Judge.

Minor Issues Involved

(b) It was error for the United States Court of Appeals for the District of Columbia Circuit to have denied to the petitioners the rights and privileges vouchsafed to all taxpayers including the petitioners, by the Congress of the United States, under Section 1140(b-1), (2) (3) of the Internal Revenue Code?

(c) It was error for the United States Court of Appeals for the District of Columbia Circuit to have dehored the record and rendered a judgment founded on an issue not raised by either the respondent or the petitioners?

STATUTES INVOLVED

Section 1140(b)(2) of the Internal Revenue Code of 1939 (reenacted as Section 748(2)(B) of the Internal Revenue Code of 1954), provides in part as follows:

"The decision of the Tax Court shall become final", (b)(2) "when the denial of a petition for certiorari, if the decision of the Tax Court has been affirmed or the petition for review dismissed by the Circuit Court of Appeals."

STATEMENT OF THE CASE

On May 24, 1954, this Court denied petitioners' petition to it for a writ of certiorari to review a decision of the United States Court of Appeals for the District of Columbia Circuit. See: 347 U. S. 975. At the time of the denial of the writ of certiorari, rule 33 of this Court was in effect. Under its provisions, the petitioners had until June 9, 1954, the privilege of filing a petition for a rehearing.

Subsequent to his decision against the petitioners, dated September 28, 1951 the petitioners had discovered fraud by Luther A. Johnson, Judge of the Tax Court. Instead of petitioning for a rehearing before the Supreme Court of the United States on issues in which fraud had not been an issue either in the Tax Court or before the said Court of Appeals or before the Supreme Court of the United States, the petitioners chose to return to the Tax Court pursuant to Section 1140(b)(2), and file their motion of June 7, 1954, in which the sole issue was fraud, by Luther A. Johnson, Judge of the Tax Court. The allegations in that motion were:

1. The opinion and judgment failed to reflect the act and conviction of the trial judge.

2. That the opinion and judgment of the trial judge were written by Howard Ellis and John B. Martineau, members of the law firm of Kirkland, Fleming, Greene, Martineau and Ellis, in their offices at 33 North LaSalle Street, Chicago, Illinois.

3. That the opinion and judgment of the trial judge were procured by fraud and coercion.

4. That the opinion and judgment of the trial judge constitute a travesty on justice. (R. pages 8 to 30).

On June 23, 1954, the Tax Court entered an order denying petitioners' motion dated June 7, 1954, on the ground that its judgments dated September 28, 1951, are now final, within the meaning of Section 1140(b)(2) of the Internal Revenue Code; that petitioners' contentions are without merit (R. 31).

On July 9, 1954, petitioners filed their petition for review in the United States Court of Appeals for the District of Columbia Circuit (R. 33). On July 23, 1954, petitioners filed their record on review in the United States Court of Appeals for the District of Columbia Circuit.

On October 22, 1954, the respondent filed his motion to dismiss the petitioner's petition on review on the ground that petitioners were precluded under Section 1140(b)(2) of the Internal Revenue Code from filing in the Tax Court their motion dated June 7, 1954 to vacate the judgment of the Tax Court dated September 28, 1951. (R. 36).

On February 3, 1955, argument was heard on the said motion of the respondent in the said Court of Appeals. On February 14, 1955, the said Court of Appeals entered an order granting the respondent's motion and dismissed the said petition on review. (R. 49)

On March 1, 1955, the said Court of Appeals, sui sponte, and without a request from either the petitioners or the respondent, entered an order vacating its order dated February 14, 1955 (R. 50), and entered a new order, in which it dehored the record, granted respondent's motion, and dismissed in said Court of Appeals the said petition on review (R. 51).

Thereafter on March 15, 1955, petitioners filed in the said Court of Appeals their petition for a re-hearing before that Court en banc (R. 53). On March 22, 1955, the said Court of Appeals denied the petitioner's petition for re-hearing en banc (R. 68).

REASONS RELIED ON FOR ISSUE OF THE WRIT

(a) Fraud effecting the administration of justice vitiates a judgment heretofore entered. Such was the expression of this Court in the early cases of *League* v. *DeYoung*, 52 U.S. 185, and *Nudd* v. *Burrows*, 91 U.S. 426. The unchallenged affidavit of fraud presented by the petitioners to the Tax Court and to the United States Court of Appeals for the District of Columbia Circuit (R. 8), charges, (R. 15) that: (a) John B. Martineau, with stolen keys in his possession, hired a professional thief to enter the office of the Puritan Church—The Church of America and remove therefrom valuable records of the petitioners for the purpose of preventing petitioners from having said records available for their hearings before the Tax Court. (b) On January 17, 1951 (R. 16), Rev. Harrison Parker received, through the United States mail, in an envelope then in use by said Kirkland law firm, documentary evidence over the signature of said Ellis and Martineau which proves that Weymouth Kirkland, said Ellis, said Martineau, Otto Kerner, U. S. Attorney at Chicago and others were engaged in a criminal conspiracy to sabotage the Puritan Church in the courts of the government of the United States. (c) That in the year of 1952, evidence was obtained by the petitioners to prove that the said law firm of Kirkland had received from the Chicago Tribune the sum of $674,000.00 to influence courts of the United States including the Tax Court against the petitioners (R. 16). (d) That the decision of the Tax Court of the United States against the petitioners entered September 28, 1951, signed by Luther A. Johnson, Judge, had been written by said Howard Ellis, said John B. Martineau and one W. A. Schwerdtfeger, a special attorney for the Commissioner of Internal Revenue, in the said Kirkland law firm's office usually occupied by its Mrs. Cohen. (e) That Luther A. Johnson, trial judge in the Tax Court, had been either influenced, intimidated or bribed to limit against the petitioners the evidence ad-

mitted into the record at the Tax Court. (f) That after the close of the Puritan Church litigation in the Tax Court of the United States, said Ellis and Martineau and said Schwerdtfeger used almost a year of time which was charged to the Chicago Tribune at the rate of $40.00 and $30.00 an hour, to write the 46 page decision of the Tax Court which was signed by their Luther A. Johnson, Judge.

Ample opportunity to answer and deny was afforded those, whose integrity was impugned by the allegations in the affidavit. No one came forward with a denial of even one of these charges. In the case of *Root* v. *Universal Refining Co.*, 3 Cir., 169 F. 2d 514, where fraud reached a member of that bench, that court did not hesitate to investigate, and try and punish the guilty judge.

The petitioners' unchallenged affidavit makes out a prima facie case of fraud in the Tax Court. A deficiency income tax assessment against a church trust fund for over $50,000 should not be allowed to stand where it is shown that it was obtained through fraudulent means. It was said in *Stockstrom* v. *Commissioner of Internal Revenue*, (U. S. App. D. C.) 190 F. 2d 283, 289, that:

> " * * * It has been well said that the government should always be a gentleman. Taxpayers expect, and are entitled to receive ordinary fair play from tax officials * * * "

In dismissing the petitioners' petition on review the said Court of Appeals failed to recognize and apply the applicable principle of law laid down by this Court in the case of *Hazel-Atlas Co.* v. *Hartford Co.*, 322 U.S. 238. Speaking through Mr. Justice Black, this court, among other things, at page 244 said:

> "From the beginning there has existed along-side the term rule a rule of equity to the effect that under certain circumstances one of which is after discovered fraud, relief will be granted against judgments regardless of the term of their entry. Marine Insurance

Co. v. Hodgson, 7 Cranch 332; Marshall v. Holmes, 141 U.S. 589."

And at page 248 the Court stated:

"Created to avert the evil of archaic rigidity, this equitable procedure has always been characterized by flexibility which enables it to meet new situations which demand equitable intervention, and to accord all the relief necessary to correct the particular injustices involved in these situations."

In the case of *Root Refining Co.* vs. *Universal Oil Products Co.*, 3 Cir. 169 F. 2d 514, fraud reached a member of the U. S. Court of Appeals for the 3rd Circuit and influenced his opinion in the controversy before him. Upon consideration of the evidence adduced as a result of the fraud hearing, Judge Soper at page 518, quoted from the opinion in Hazel-Atlas:

"the inherent power of a Federal Court to investigate whether a judgment was obtained by fraud, is beyond question."

* * * * *

At page 521, the Court held that an Appellate Court has the inherent power of a court to inquire into the integrity of its own judgments, and said:

"Such a judgment implies the prior existence of a justifiable case or controversy between opposing litigants; but when the controversy has been terminated by a judgment, its freedom from fraud may always be the subject of further judicial inquiry, and the general rule that courts do not set aside their judgments after the term at which they were rendered has no application."

"The power inheres in the appellate as well as the trial court and the former may vacate its own judgment and direct the vacation of a decree of the latter entered pursuant to the mandate of the former." (page 522)

The opinion in that case, concluded by stating that the undisputed evidence of fraud demanded the vacation of

the judgment, and it was so ordered. See also *Keystone Co.* vs. *Excavator Co.*, 290 U.S. 240, 246, on the clean hands maxim.

The court in the *Root* case having concluded that Judge Davis, the appellate judge, had been influenced in his opinion, recalled its mandate in the *Root* cases, vacated the judgment of the Court therein, remanded the cases to the District Court with direction to vacate its judgment therein and dismiss the suits by reason of the fraud practiced upon the Court. Accord: *A. B. Dick Co.* vs. *Marr*, 197 F. 2d 498, 503.

It was appalling for the Tax Court to have declared in its order dated June 23, 1951, that the said motion of the petitioners to vacate its judgment dated September 28, 1951, was without merit. It was equally shocking for the said Court of Appeals to have dismissed the petition for a review of that order. There was merit in the petitioners' charges of fraud and their contention that the $106,000.00 Trust Fund confiscated by the Commissioner of Internal Revenue, was "earmarked" funds of the Puritan Church Building fund. It is evinced by the following decisions of the Tax Court dated April 6, 1955:

THE TAX COURT OF THE UNITED STATES
WASHINGTON

Docket No. 38481

PURITAN CHURCH BUILDING FUND, Harrison Parker and Edith S. Parker, Trustees, *Petitioners*,

v.

COMMISSIONER OF INTERNAL REVENUE, *Respondent*.

DECISION

Pursuant to the Concession by Respondent filed with the Court on April 4, 1955, it is

ORDERED and DECIDED, that there is no liability due from the Puritan Church Building Fund as transferee of the

assets of Puritan Church—The Church of America, LaGrange, Illinois, transferor, for income taxes due from that corporation for the taxable year 1948.

(Signed) EUGENE BLACK
Judge

Enter: ENTERED APR 6 1955
(Date Stamped)

Form 350
Rev. Oct. 1942

THE TAX COURT OF THE UNITED STATES
WASHINGTON

Docket No. 38069

TRUSTEES OF THE PURITAN CHURCH, *Petitioners,*

v.

COMMISSIONER OF INTERNAL REVENUE, *Respondent.*

DECISION

Pursuant to the Concession by Respondent filed with the Court on April 4, 1955, it is

ORDERED and DECIDED, that there is no liability due from Trustees of the Puritan Church as transferee of the assets of Puritan Church Building Fund which is a transferee of assets of Puritan Church—The Church of America, LaGrange, Illinois, transferor, for income taxes due from that corporation for the taxable years October 14, 1945 to December 31, 1945, 1946, 1947 and January 1, 1948 to June 30, 1948.

(Signed) EUGENE BLACK
Judge

Enter: ENTERED APR 6 1955
(Date Stamped)

Form 350
Rev. Oct. 1942

By the order of Luther A. Johnson, Judge of the Tax Court, dated September 28, 1951, over $50,000 in the $106,000 Bible and Building Trust Fund of the Puritan Church in the custody of the Greenwich Trust Company, was confiscated to the Treasury of the Government of the United States; by the order of Judge Black of the same Tax Court, $56,000 of the same trust fund was ordered restored to the Puritan Church Building Trust Fund: the court record before Judge Black was identical with the court record that was before Judge Johnson; the witnesses on both sides were the same; their testimony was the same; the applicable law argued before both Judge Johnson and Judge Black was the same; Judge Johnson found $50,000 against the Puritan Church Building Trust Fund; Judge Black found $56,000 of the same trust fund for the Puritan Church Building Fund; the petitioners have charged Judge Johnson with fraud; the Commissioner has not appealed the final decision of Judge Black.

(B) The only issue raised by respondent's motion to dismiss in the said Court of Appeals was a jurisdictional issue. In clear language in that motion the respondent declared that the judgment of the Tax Court dated September 28, 1951, was final within the meaning of Section 1140(b)(2) of the Internal Revenue Code; therefore, the respondent declared that the said Court of Appeals was without jurisdiction to entertain the petitioners' petition to review. In that motion the respondent carefully avoided the issue of fraud which is the major issue in this litigation.

It is not clear from the order of the said Court of Appeals dated March 1, 1955 (R. 51), whether the said order of said Court of Appeals rests upon the jurisdictional question, raised by the respondent, or upon a consideration of matters which could not have been properly raised in the previous litigation in an Appellate Court. In its final order dated March 1, 1955 (R. 51), the said Appellate

Court carefully avoids making the unequivocal statement to wit: that fraud had been an issue before it, and before the Supreme Court of the United States in previous litigation, and had been decided by it and the Supreme Court of the United States against the petitioners.

The petitioners filed their motion to vacate judgment in the Tax Court on June 7, 1954, which was within the 15 days allowed for a petition for a rehearing under Rule 33 of this court in effect at that time. It was argued in the United States Court of Appeals, by the respondent, that since the petitioners did not file in the Supreme Court of the United States (347 U.S. 975) a petition for a rehearing, the United States Court of Appeals decision dated November 5, 1953, became final immediately within the meaning of the said Section 1140(b)(2) of the Internal Revenue Code.

In the case of *R. Simpson & Co.* vs. *Commissioner of Internal Revenue*, 321 U.S. 225, the petition for certiorari was denied on November 9, 1942. Thereafter, the 25 days then allowed in which to seek a rehearing, expired. In February, 1943, the petitioner was granted leave to file out of time its petition for a rehearing. On June 7, 1943, this Court granted the petition for rehearing, vacated the order denying certiorari and granted certiorari and limited the arguments to the questions of penalty, and the jurisdiction of this Court to entertain a petition filed after the time provided under its rule 33 and 34. This court in a 6 to 3 decision, speaking through the late Justice Jackson, held:

> That for the purpose of Section 1140(b) of the Internal Revenue Code, this court was without jurisdiction to hear the case after the expiration of the time allowed for filing petition for rehearing.

The opinion, however, evidenced the use of the following language:

> "Our rules provide for petition for rehearing as a matter of right within 25 days after judgment and this

rule *has been applied to petition for rehearings of order denying certiorari.* (Emphasis supplied). *We have applied it to cases falling within the purview of Section 1140(b)(2).* (Emphasis supplied). No mandate issue on denial of petition for certiorari and after a final decision, the mandate does not issue until expiration of the 25 days period within which petition for a rehearing may be filed."

The opinion further provided that:

"If therefore, we follow the practice heretobefore served by which *we regard denials of certiorari qualified until the 25 day period expires,* we put the denial and the decision on generally equal basis, except as Congress has seen fit to give the latter an additional 30 days before finality." (Emphasis supplied).

The power to construe and determine the meaning and operation of its rules is an exclusive function of this court. The power of the Congress to declare the circumstances under which a judgment of the Tax Court shall become final, is unquestioned. But such power does not imply the right on the part of the legislative branch to determine the meaning of the rules of this court. The Congress may well be within its constitutional authority in saying that in all cases in which the Court of Appeals have affirmed the decisions of the Tax Court and the Supreme Court has denied certiorari, the judgment of the Tax Court is final. However, the question as to what constitutes a denial of certiorari, immediately arises.

Such questions are judicial and not legislative, and the answer lies within the province of this court and not within the statutory provisions.

Moreover, the language of the *R. Simpson Co.* case, *supra,* has supplied the answer of this court. Any other conclusion would lead to futile casuistry: It would offer an incentive for the filing of petitions for rehearings upon

denial of certiorari in this court, in order to toll the statute in the Tax Court.

On the other hand, when this court has denied certiorari, and the petitioner sees no basis for a petition for rehearing but has a grievance remaining to be redressed in the Tax Court, for after discovered fraud, he is not to be penalized for returning to Tax Court within the time allowed for the filing of a petition for rehearing in this court. To say that after denial of certiorari, the judgment of the Tax Court is final, immediately, but if a rehearing is sought the judgment of the Tax Court does not become final, until the disposition of the petition for rehearing, attributes to the Congress the passage of discriminatory legislation. It is unconscionable to believe that either the Congress or this court contemplates any such result.

(C) It is true that subsequent to the decision of the said Court of Appeals reported in 93 U.S. App. D.C. 129, 209 F. 2d 306, the petitioners in despair, without a lawyer to defend them against the powerful forces which were arrayed against them in the courts, tendered out of order the substance of their affidavit which is now before this Court (R. 8), through a motion for leave to file same in said Court of Appeals. But leave was neither granted nor denied. That court has never taken any action on said motion for leave to produce evidence of fraud in the Tax Court in its decision dated September 28, 1951. The United States Court of Appeals in vacating, sui sponte, its order dated February 14, 1955, and substituting its order dated March 1, 1955 (R. 51), departed so far from the accepted and usual course of judicial proceedings, as to require the exercise of the high powers of this Court to correct such departure.

In view of the importance of the main issue involved in this litigation, the writ prayed for should issue.

Respectfully submitted,

EDITH S. PARKER

REV. HARRISON PARKER
Trustees acting under the designation of the above entitled cause
820 Connecticut Avenue
Washington, D. C.

APPENDIX

APPENDIX

APPENDIX

"Before: EDGERTON, PRETTYMAN and FAHY, *Circuit Judges.*

Order

These cases came on for consideration on respondent's motion to dismiss and said motion was argued by counsel for respondent and by Harrison Parker, trustee for petitioners, and it appearing that petitioners, on November 30, 1953, presented to this Court, in petitions for rehearing of the judgment promulgated November 5, 1953 (*Puritan Church of America* v. *Commissioner of Internal Revenue,* 93 U.S. App. D.C. 129, 209 F. 2d 306), the same allegations and grounds which were presented to the Tax Court on June 7, 1954, in the motion to vacate the judgment of that court of September 28, 1951, and that said petitions for rehearing were denied by this Court on December 11, 1953; and it further appearing that additional motions and affidavits of similar content and tenor were filed in this Court on January 13, 1954, and January 20, 1954; and it further appearing that thereafter petitions Nos. 12,340-1 —Puritan Church, etc. v. Commissioner of Internal Revenue for certiorari were filed in the Supreme Court of the United States and were denied by that Court,

Therefore it is ORDERED by the Court that the aforesaid respondent's motion be granted, and that the petitions for review herein be, and they are hereby, dismissed.

Per Curiam.

Dated: March 1, 1955"

Office - Supreme Court, U. S.
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v.

COMMISSIONER OF INTERNAL REVENUE, *Respondent*

MOTION TO HAVE JUSTICES FRANKFURTER, DOUGLAS AND CLARK DISQUALIFY THEMSELVES FROM PARTICIPATION IN THE CONSIDERATION OF THE ABOVE-ENTITLED CAUSE.

EDITH S. PARKER
REV. HARRISON PARKER
Acting under the designation of the above-entitled cause

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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Come now the petitioners herein, and pray that Justices Frankfurter, Douglas and Clark disqualify themselves from participation in this court, in the consideration of the above-entitled cause. The reason is:

There was delivered to Rev. Harrison Parker in his capacity of minister of the Puritan Church at La Grange, Illinois, evidence to prove that the taxable